

## Message Text

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FM AMEMBASSY BONN

TO SECSTATE WASHDC NIACT IMMEDIATE 1754

INFO USMISSION USBERLIN IMMEDIATE

AMEMBASSY BERLIN

AMEMBASSY LONDON

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AMEMBASSY PARIS

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C O N F I D E N T I A L SECTION 01 OF 03 BONN 15260

E.O. 11652: GDS

TAGS: PFOR PGOV WB GW UR

SUBJECT: TAKEOVER IN BERLIN OF ANTI-TERRORISM LAW

REFS: (A) USBER 1875; (B) BONN 15068

BEGIN SUMMARY. AFTER FURTHER BONN GROUP DISCUSSION,  
ALLIED REPS HAVE AGREED TO RECOMMEND TO CAPITALS THAT  
THE NEW ANTI-TERRORISM LAW BE APPLIED IN BERLIN WITH  
THE EXCEPTION ONLY OF ARTICLE 3(2). THIS SECTION  
EXPRESSLY STATES THAT THE FEDERAL PROSECUTOR HAS THE  
RIGHT TO DECIDE DISPUTES WHICH MIGHT ARISE WITH THE  
LOCAL PROSECUTOR OVER HANDLING OF A CASE, AND WOULD  
THUS APPEAR ON THE SURFACE TO BE AN EXTENSION OF THE  
FEDERAL PROSECUTOR'S COMPETENCE IN BERLIN. FRG REPS  
AGREED WITH UNDERSTANDING OF ALLIED REPS THAT SUSPENSION  
OF THIS SECTION WOULD NOT, HOWEVER, HAVE ANY ACTUAL  
EFFECT ON THE ABILITY OF THE PROSECUTING AUTHORITIES  
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TO TAKE NECESSARY ACTION IN PROSECUTING SERIOUS

OFFENSES IN BERLIN. IF AN ALLIED BK/O IS TO BE  
PUBLISHED SIMULTANEOUSLY WITH THE NEW LAW, IT WOULD HAVE  
TO BE ISSUED BY TUESDAY, SEPTEMBER 14. ACTION REQUESTED:  
THAT THE DEPARTMENT INSTRUCT US MISSION BERLIN TO  
JOIN WITH BRITISH AND FRENCH MISSIONS IN DRAFTING A  
SUITABLE BK/O AND ALSO TO ASSIST IN PREPARING PRESS  
GUIDANCE. END SUMMARY.

1. AT BONN GROUP MEETING SEPTEMBER 10, FRG REP  
(DUISBERG), AFTER CONSULTATION WITH FEDERAL JUSTICE  
MINISTRY, EXPANDED ON VIEWS HE HAD EXPRESSED AT BONN  
GROUP MEETING SEPTEMBER 8. HE REITERATED THAT  
ARTICLE 129A OF THE PENAL CODE (A NEW SECTION ADDED BY  
ARTICLE 1 OF THE LAW UNDER CONSIDERATION) WAS SEPARATE  
SECTION FROM SECTION 129, AS NOTED BY MISSION IN  
REFTEL (A). SECTION 129A REMOVES FROM CURRENT SECTION  
129 THE OFFENSE OF ESTABLISHMENT OF CONSPIRACY FOR THE  
MOST SERIOUS OFFENSES PREVIOUSLY INCLUDED IN SECTION  
129, AND MAKES CONSPIRACY TO COMMIT THOSE OFFENSES  
(MURDER, MANSLAUGHTER, GENOCIDE, CERTAIN OFFENSES  
AGAINST PERSONAL FREEDOM, CERTAIN OFFENSES CREATING  
PUBLIC DANGER) SUBJECT TO GREATER PENALTIES THAN  
WHEN THEY WERE ENCOMPASSED BY SECTION 129. UNDER NEW  
LAW, SECTION 129 NO LONGER ENCOMPASSES CONSPIRACIES  
TO COMMIT THOSE OFFENSES SPECIFICALLY COVERED BY  
SECTION 129A.

2. DUISBERG EXPLAINED THAT ARTICLE 3(1) OF THE NEW  
LAW -- WHICH AMENDS THE PROCEDURAL LAW (GVG) -- DOES  
NOT CREATE A NEW COMPETENCE FOR HIGHEST LAND COURTS  
AND THEREBY FOR FEDERAL PROSECUTOR. IF IT DID, ENTIRE  
LAW WOULD HAVE REQUIRED BUNDES RAT CONSENT WHICH WAS  
NEITHER SOUGHT NOR GIVEN. UNDER EXISTING LAW (WITH  
SECTION 129A OFFENSES STILL INCLUDED WITHIN SECTION  
129), FEDERAL PROSECUTOR HAS PROSECUTING COMPETENCE IF  
INDIVIDUAL CASE HAS SPECIAL IMPORTANCE. CASES COVERED  
BY SECTION 129A, WHICH WOULD IN ANY EVENT BE OF SPECIAL  
IMPORTANCE AND THUS PROSECUTABLE EVEN NOW BY FEDERAL  
PROSECUTOR, WOULD BY OPERATION OF ARTICLE 3(1) OF NEW  
LAW BY THEIR ADDITION TO SEVEN OTHER OFFENSES ALREADY  
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WITHIN ORIGINAL COMPETENCE OF HIGHEST LAND COURTS, FALL  
WITHIN EXCLUSIVE PROSECUTORIAL RESPONSIBILITY OF  
FEDERAL PROSECUTOR. ONLY CHANGE IS THAT FEDERAL  
PROSECUTOR WILL NO LONGER NEED TO ESTABLISH SPECIAL  
IMPORTANCE OF EACH INDIVIDUAL SECTION 129A CASE IN ORDER  
TO BE ABLE TO ASSERT HIS PREEMPTIVE AND EXCLUSIVE  
PROSECUTORIAL RESPONSIBILITY.

3. DUISBERG CONTINUED THAT IF ARTICLE 3(1) OF NEW LAW  
WERE SUSPENDED IN BERLIN, SUCH ACTION WOULD CHANGE THE  
EXISTING COMPETENCE OF THE FEDERAL PROSECUTOR. OFFENSES  
COVERED BY SECTION 129A, HAVING BEEN REMOVED FROM  
SECTION 129, WOULD NO LONGER BE OFFENSES FOR WHICH  
FEDERAL PROSECUTOR COULD IN WSB PROSECUTE IN ANY  
CIRCUMSTANCES. SECTION 129A CASES WOULD BE HANDLED

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C O N F I D E N T I A L SECTION 02 OF 03 BONN 15260

BY NORMAL BERLIN LAND COURT, AND PROSECUTION COULD ONLY  
BE HANDLED BY BERLIN PROSECUTOR ATTACHED TO THAT COURT.  
FEDERAL PROSECUTOR WOULD HAVE NO COMPETENCE AT ALL FOR  
SECTION 129A OFFENSES IN BERLIN AND COULD NO LONGER  
INTERVENE EVEN ON BASIS OF ARGUMENT THAT CASE HAD  
SPECIAL IMPORTANCE. IN THIS WAY, DUISBERG ARGUED,  
EXISTING SITUATION WOULD BE CHANGED AND PURPOSE OF THE

NEW LAW -- GETTING A BETTER HANDLE ON TERRORIST OFFENSES -- WOULD BE FOILED SO FAR AS BERLIN WAS CONCERNED.

4. TURNING TO THE SECOND PART OF ARTICLE 3, DUISBERG STATED THAT ARTICLE 3(2) IS CLARIFICATION OF EXISTING LAW. HE ADMITTED THAT FEDERAL JUSTICE MINISTRY WAS NOT HAPPY WITH WAY THIS SUBPARAGRAPH (WHICH IS QUOTED IN PARA 3, REF A) WAS DRAFTED. ITS PURPOSE WAS TO

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RESOLVE OCCASIONAL DISPUTES THAT HAVE ARISEN BETWEEN FEDERAL AND LOCAL PROSECUTOR OVER QUESTION WHETHER ONE OF THE TYPES OF OFFENSES FOR WHICH HIGHEST LAND COURT HAS ORIGINAL JURISDICTION WAS INVOLVED OR NOT IN SPECIFIC CASE. UNDER ARTICLE 3(2) OF NEW LAW, FEDERAL PROSECUTOR WOULD HAVE EXPRESS AUTHORITY TO MAKE DEFINITIVE DECISION ON THIS QUESTION. DUISBERG'S ANALYSIS AGREED WITH USBER'S THAT IF ARTICLE 3(2) OF NEW LAW WERE SUSPENDED FROM APPLICATION IN BERLIN, NOTHING WOULD BE CHANGED FOR ALL PRACTICAL PURPOSES. THIS IS SO BECAUSE IF SUCH DISPUTE ARISES, FEDERAL PROSECUTOR ALREADY HAS THE RIGHT UNDER PROVISIONS OF EXISTING LAW TO MAKE THE FINAL DECISION.

5. IN DISCUSSION FOLLOWING DUISBERG PRESENTATION, THE FOLLOWING CONCLUSIONS WERE REACHED:

-- THE TAKEOVER IN BERLIN OF ARTICLE 3(1), WHILE OPTICALLY HARMLESS, WOULD BE ESSENTIAL TO PRESERVING THE ABILITY OF THE FEDERAL PROSECUTOR TO HANDLE OFFENSES UNDER SECTION 129A OF THE PENAL CODE. ADMITTEDLY, ARTICLE 3(1) MIGHT BE CONSIDERED QUANTITATIVELY TO INCREASE THE POWERS OF THE FEDERAL PROSECUTOR IN BERLIN IN THAT IT ADDS ONE MORE OFFENSE (THAT COVERED BY ARTICLE 129A) TO THE LIST OF THOSE FOR WHICH HE HAS COMPETENCE. ON ITS FACE, HOWEVER, ARTICLE 3(1) SIMPLY STATES WHAT COURT WILL HAVE ORIGINAL JURISDICTION OVER THE NEW OFFENSE IN SECTION 129A, AND IT IS ONLY THROUGH THE OPERATION OF OTHER PROVISIONS OF THE PROCEDURAL LAW THAT THE COMPETENCE OF THE FEDERAL PROSECUTOR IS ESTABLISHED.

-- ARTICLE 3(2), ON THE OTHER HAND, WHILE IT HAS NO SUBSTANTIVE IMPORTANCE IN BERLIN, IS OPTICALLY TROUBLESOME. IT SPECIFICALLY STATES THAT THE FEDERAL PROSECUTOR WOULD HAVE THE POWER TO RESOLVE DISPUTES WITH THE BERLIN PROSECUTOR -- AN APPARENT EXERCISE OF STATE AUTHORITY.

6. FRG REPS EXPRESSED CLEAR PREFERENCE THAT ENTIRE  
LAW BE APPLIED IN WSB WITH NORMAL ALLIED RESERVATIONS  
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CONCERNING RIGHTS AND RESPONSIBILITIES AND REFERENCE  
TO BK/O (51) 63. THEY SUGGESTED POSSIBILITY THAT BK/O  
BE SPECIFICALLY MENTIONED AS APPLICABLE WITH RESPECT  
TO ARTICLE 3(2) OF NEW LAW. ALLIED REPS AGREED THAT  
WHILE BK/O (51) 63 SHOULD IN ANY EVENT BE MENTIONED IN  
BK/O CONCERNING APPLICATION OF ANTI-TERRORIST LAW,  
THIS ALONE WAS NOT ADEQUATE TO RESOLVE DIFFICULTIES  
CREATED BY LANGUAGE OF ARTICLE 3(2) OF NEW LAW. ALLIED  
REPS EXPLAINED THAT PURPOSE OF BONN GROUP CONSULTATIONS  
ON THIS MATTER WAS NOT TO REQUEST FRG AGREEMENT TO  
DELETION OF ARTICLE 3(2). PURPOSE WAS TO OBTAIN  
CLARIFICATION OF OPERATION OF NEW LAW AND LEGAL CONSE-  
QUENCE OF SUSPENSION OF ALL OR PART OF ARTICLE 3, AND  
TO DISCUSS POLITICAL EFFECT OF ULTIMATE ALLIED  
DECISION ON THIS PARTICULARLY SENSITIVE MATTER. IT  
WAS FULLY REALIZED THAT ALLIED ACTION COULD HAVE REAL  
OR PERCEIVED IMPLICATIONS FOR THE COMMON FIGHT AGAINST  
TERRORISM, FRG UPCOMING ELECTIONS, AND FOR SOVIETS

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TO SECSTATE WASHDC NIACT IMMEDIATE 1756  
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IN VIEW OF THEIR INTENSE INTEREST IN MATTERS FALLING  
IN THIS AREA.

7. FRENCH, UK AND US REPS AGREED TO RECOMMEND TO  
CAPITALS THAT MISSIONS BE INSTRUCTED TO PREPARE BK/O  
WHICH WOULD SUSPEND APPLICATION IN WSB OF ARTICLE 3(2)  
OF NEW LAW. UK LEGAL ADVISER INDICATED THAT BECAUSE  
OF PRINTER'S DEADLINE, BK/O WOULD HAVE TO BE ISSUED  
NO LATER THAN SEPT 14 IN ORDER TO BE PUBLISHED IN  
BERLIN ON SEPT 20 TOGETHER WITH LAW. ALLIED REPS  
AGREED THAT, WHILE NOT LEGALLY ESSENTIAL, THIS WAS  
HIGHLY DESIRABLE. ALLIED REPS AGREED, THEREFORE,  
TO RECOMMEND TO CAPITALS THAT MISSIONS RECEIVE INSTRU-  
CTIONS BY NO LATER THAN MONDAY, SEPT 13.

8. AT TRIPARTITE MEETING SEPT 8, AT WHICH PRELIMINARY  
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AGREEMENT ON ABOVE RECOMMENDATIONS HAD BEEN REACHED,  
ALLIED REPS ALSO AGREED THAT PROPOSED LANGUAGE IN  
BK/O (USBER 1737) EXPRESSLY RESERVING TO THE ALLIES  
THE RIGHT TO DETERMINE IN PARTICULAR CASE THE APPRO-  
PRIATE AUTHORITY FOR CONDUCT OF A PROSECUTION WOULD BE  
UNDESIRABLE. IT COULD HAVE EFFECT OF PUTTING ALLIES ON  
RECORD AS HAVING APPROVED EVERY SINGLE CASE WHICH  
FEDERAL PROSECUTOR FINALLY HANDLES IN WSB. THERE WAS  
GENERAL UNEASE AT EFFECT VIS-A-VIS FRG AND USSR OF  
SUCH EXPRESS ENGAGEMENT OF ALLIED RESPONSIBILITY WITH  
RESPECT TO EACH CASE.

9. ALLIED REPS ALSO AGREED TO RECOMMEND THAT BERLIN  
MISSIONS BE ASKED TO PREPARE PRESS GUIDANCE, FOR REVIEW  
IN BONN GROUP AND CAPITALS, TO HANDLE QUESTIONS THAT  
MAY ARISE ON WHY ARTICLE 3(2) COULD NOT BE TAKEN OVER  
IN BERLIN.

10. ACTION REQUESTED:

A. FOR DEPARTMENT: RECOMMEND THAT DEPARTMENT

CONCUR IN AUTHORIZING THE TAKEOVER IN BERLIN OF ALL OF  
THE NEW ANTI-TERRORISM LAW WITH THE EXCEPTION OF  
ARTICLE 3(2) AND INSTRUCT USBER TO JOIN WITH OTHER  
MISSIONS IN DRAFTING THE NECESSARY BK/O;

B. FOR USBER: ASSUMING APPROVAL OF THE FOREGOING  
RECOMMENDATION, THAT USBER JOIN WITH OTHER MISSIONS IN  
DRAFTING BK/O AND CONSIDERING QUESTION OF NEED FOR  
BK/L IN ADDITION. WOULD APPRECIATE RECEIVING DRAFT(S)  
FOR CONSIDERATION BY EMBASSIES AT TRIPARTITE MEETING  
SCHEDEDULED FOR MONDAY AFTERNOON, SEPT 13, WITH A VIEW TO  
ISSUANCE OF BK/O IF AT ALL POSSIBLE ON SEPT 14. ALSO  
REQUEST YOUR ASSISTANCE IN WORKING OUT WITH OTHER  
MISSIONS DRAFT PRESS GUIDANCE.

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## Message Attributes

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